U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 February 2004

In the Matter of:

GLEN R. HOWARD,
Claimant,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

CASE NO: 2003BLA5274

Appearances:

Glen Howard
pro se Claimant

Francine Serafin, Esquire
For the Director

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER – GRANTING BENEFITS

Statement of the Case

This proceeding involves a first claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. 901 *et seq*. ("the Act") and the regulations promulgated thereunder.[1] Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies. §718.2. Since the claim was pending on the effective date, January 19, 2001, of the amendments to Parts 718 and 725, consideration of the claim is governed by the amendments in accordance with their terms.[2] Because the Claimant was last employed in coal mine work in the state of Virginia, the

[1] All applicable regulations which are cited are included in Title 20 of the Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director's Exhibits are indicated as "D-".

[2] The District Director referred to this claim as a new regulations claim. However, because this claim was filed on January 2, 2001, this is an old regulations claim, and has been treated as such

law of the United States Court of Appeals for the Fourth Circuit controls. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

Procedural History

The instant claim was filed by Glen R. Howard (the "Claimant"), on January 2, 2001 (D-2). The Director ultimately denied benefits on September 23, 2002, because Claimant had not proved that he was totally disabled due to pneumoconiosis caused by his four to six months of coal mine work (D-14).[3] Claimant requested a hearing before an administrative law judge on November 7, 2002 (D-15). The parties agreed to waive their rights to a formal hearing, the hearing was cancelled, and this tribunal directed a decision on the written record in an order dated July 11, 2003.[4]

ISSUES

1. What is Claimant's length of coal mine employment?
2. Whether Claimant has coal workers' pneumoconiosis?
3. Whether Claimant's pneumoconiosis, if proved, arose out of his coal mine employment?
4. Whether Claimant is totally disabled by a respiratory or pulmonary impairment?
5. Whether Claimant's total disability, if proved, is due to coal worker's pneumoconiosis?

FINDINGS OF FACT

Background and Length of Coal Mine Employment

Claimant was born on September 2, 1922, and his highest level of education is unknown (D-11). Claimant married Frances Howard on August 10, 1945 (D-6). Claimant was currently married and residing with his wife at the time of filing (D-1). Claimant has no other dependents (D-1). Claimant declared that he completed thirty-three years of coal mine employment (D-2). The District Director found that Claimant had established approximately six to nine months of coal mine employment (D-13). Claimant's Social Security and FICA statements show that Claimant worked for Clinchfield Railroad from 1979 to 1982 (D-11).

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by this tribunal. There has been no prejudice to the Director or Claimant, and this is a harmless error.

[3] The District Director denied benefits to Claimant on April 23, 2001, because Claimant did not prove that he had been employed as a coal miner (D-12). In a letter dated May 7, 2001, Claimant requested reconsideration of his claim (D-11). On June 21, 2001, the Director denied benefits because Claimant had not proved that he had been employed as a coal miner, and alternately, he had not proved that he had pneumoconiosis caused by coal mine work (D-13). Claimant requested reconsideration of his claim in letters dated July 31, 2001 and September 17, 2001 (D-11).

[4] This tribunal received Director's exhibits one through sixteen as part of the claim and the exhibits have been admitted into the record.

In a letter submitted on March 9, 2001, Claimant declared that he worked for Carter Coal Co. in Coretta, West Virginia for seven to nine months in a coal mine laying track for coal carts (D-11). He declared that he worked for Clinchfield Railroad from 1947 to 1949 as a fireman on a steam engine that hauled coal from a coal mine in Elkhorn, Kentucky to steam plants and various independent coal yards in Spartanburg, South Carolina (D-11). Claimant declared that he worked for Union Switch and Signal Co. from 1949 to 1950 in non-coal related work (D-11). Claimant declared that he went back to work for Clinchfield Railroad in 1950, and worked for it until 1984 (D-11). He declared that from 1950 to 1973, while working as a carman and repairman "in the shops," he repaired coal hauling cars, "drove and bucked ribbits," used welding machines and burning torches, and worked in the train yard inspecting and repairing coal cars, coupling air hoses, and performing brake tests (D-11). He declared that Clinchfield transferred him to Dant, Virginia in 1974, and from 1974 to 1984, in addition to the previous duties as a carman and repairman, he went to the coal mines to "pick up" "wrecked" coal hoppers and "rerail" cars that had been "wrecked" (D-11). Claimant declared that coal dust was continuously in the air from the "weighing and shifting of loaded coal hoppers being coupled together" (D-11). Dr. Jeff Farrow recorded that Claimant worked for Clinchfield Railroad from 1950 to 1983 (D-8). Dr. Farrow recorded that Claimant worked at Dant, Virginia, "for the last 10 years of his life" as a coal car weigher and operator, which was "particularly a dusty job" (D-8).

Dr. Farrow recorded that Claimant smoked two cigarettes a day for approximately eighteen years in his February 23, 2001 report (D-7). He recorded that Claimant smoked one package of cigarettes a day for approximately ten years in his January 19, 2002 report (D-8). While these are widely differing claims, it is clear that Claimant did not have an insubstantial smoking history. Therefore, this tribunal finds that Claimant had a fourteen year smoking history of one half pack a day.

Medical Evidence

Chest X-ray Evidence[5]

Exh. No.	X-ray Date	Physician	Qualifications	Film Quality	Interpretation
D-7	2/23/01	Farrow	-/-	1	0/0
D-7	2/23/01	Sargent	R/B	3[6]	0/0
D-8	1/18/02	Farrow	-/-	1	0/0[7]
D-8	1/18/02	Goldstein	B	3[8]	0/0

[5] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "R". An interpretation of "0/0"signifies that the film was read completely negative for pneumoconiosis.

[6] Dr. Sargent opined that the film was of very marginal quality.

[7] Dr. Farrow opined that there was evidence of pleural thickening consistent with pneumoconiosis.

Pulmonary Function Studies[9]

Exh. No.	Test Date	Age/ Ht.	Physician	Co-op./ Undst./ Conf.?	FEV1	FVC	MVV	Qualify
D-7	2/25/01	78/ 69"	Farrow	Good/ Good/ Yes	1.23	2.87	37	Yes[10]
D-8	1/18/02	79/ 69"	Farrow	Good/ Good/ No[11]	1.06 1.16	1.92 2.07	25 37	Yes[12] Yes

Arterial Blood Gas Studies[13]

Exh. No.	Test Date	Physician	Conform?	pO2	pCO2	Qualifying
D-7	2/23/01	Farrow	Yes	76 80	42 41	No No
D-8	1/18/02	Farrow	Yes	71 72	44 40	No No

Medical Reports/Opinions

Dr. Jeff Farrow[14]

In a medical report dated February 23, 2001, Dr. Farrow, who is board-certified in internal medicine and the subspecialty of pulmonary disease, recorded that Claimant "never really worked in the coal mines," but that he worked for Clinchfield Railroad from 1947 to 1980 as a fireman and mechanic, and hauled coal. He also recorded that Claimant smoked two

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[8] Dr. Goldstein opined that the film was overexposed.
[9] The second set of values indicates post-bronchodilator studies.
[10] Dr. Michos opined that the vents were acceptable, but that there was a suboptimal MVV performance (D-7).
[11] Three tracings were not present
[12] Dr. Michos opined that the vents were not acceptable because there were an insufficient number of FVC, FEV1, or MVV tracings without explanation for the deficiency (D-8).
[13] The second set of values indicates the exercise portion of the study.
[14] This tribunal has taken judicial notice of Dr. Farrow's qualifications by reference to the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org.

cigarettes a day from 1934 to 1952. Dr. Farrow opined that Claimant had a normal examination. Dr. Farrow noted that Claimant had a previous history of coronary artery disease requiring bypass grafting and pacemaker placement in 1999, and that Claimant has been healthy other than for chronic dyspnea on exertion. He opined that Claimant had a moderate obstructive ventilatory defect on pulmonary function tests with normal blood gases, EKG, and chest x-ray. Dr. Farrow's cardiopulmonary diagnoses of Claimant were "previous CABG for coronary artery disease" and obstructive ventilatory defect. The etiology for the coronary artery disease was atherosclerosis and the etiology for the ventilatory defect was tobacco and coal dust exposure. Dr. Farrow concluded that Claimant had a moderate impairment secondary to exposure from coal running coal trains for Clinchfield Railroad for thirty-three years. (D-7)

In a medical opinion letter dated October 17, 2001, Dr. Farrow opined that Claimant "clearly" has underlying lung disease due to "tobacco and coal dust." Dr. Farrow declared that "it is my guess" that Claimant's obstructive lung disease was related to both coal dust and "tobacco," and that since he spent nearly thirty-three years working for the Clinchfield Railroad around coal dust, "most of the exposure in that venue has caused his chronic lung disease." Dr. Farrow opined that Claimant may have incurred some additional injury as a result of his six months of employment in the coal mines, but he "can get no closer to partitioning the effects of each." Dr. Farrow opined that he could not "offer partitioning" of how much the obstructive disease is due to tobacco abuse or to coal dust exposure. He opined "I think that he cannot retain his pulmonary capacity to perform the duties that were required in his last coal mining job." (D-9)

In a medical report dated January 19, 2002, Dr. Farrow recorded that Claimant worked from 1973 to 1983 loading and weighing coal cars, from 1950 to 1973 as a carman, and from 1947 to 1949 as a fireman shoveling coal. He also recorded that Claimant smoked one package of cigarettes a day from 1942 to 1952. Dr. Farrow opined that an examination of Claimant's lungs revealed a few rhonchi. He opined that the pulmonary function tests showed moderately severe obstructive ventilatory defect with severe reduction in the MVV. Dr. Farrow's cardiopulmonary diagnoses for Claimant were obstructive pulmonary disease and "HX MVR & Afib." The etiology of the pulmonary disease was tobacco and coal dust and the etiology of the "HX MVR & Afib" was rheumatic "valvular" disease. Dr. Farrow concluded that Claimant had a moderate to severe impairment secondary to obstructive lung changes primarily caused by "the lung process." Dr. Farrow also concluded that Claimant had significant cardiopulmonary disease in the form of obstructive lung disease, most likely due to coal mine dust exposure based on patient's employment history. (D-8)

Dr. Michael S. Sherman[15]

In a medical report dated September 1, 2002. Dr. Sherman, who is board-certified in internal medicine and the subspecialty of pulmonary disease, recorded that Claimant "alleges" four to six months of coal mine employment and had a thirty-four year history of railroad

[15] This tribunal has taken judicial notice of Dr. Sherman's qualifications by reference to the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org.

employment. Dr. Sherman declared that x-ray readings by Drs. Goldstein, Farrow, and Sargent were negative for pneumoconiosis. Dr. Sherman opined that the January 18, 2002, pulmonary function test was an unacceptable study for various stated reasons. Dr. Sherman opined that Claimant "clearly" suffers from chronic pulmonary disease and the evidence supports the presence of moderate to severe chronic obstructive lung disease. Dr. Sherman opined that the cause of Claimant's lung disease was "primarily" coal dust exposure from thirty-four years of working for Clinchfield Railroad, with a "significant" additional injury from a ten pack year smoking history. He opined that the pleural changes reported by Dr. Farrow also suggest that asbestos exposure may have played a factor in Claimant's pulmonary impairment. Dr. Sherman opined that it is "likely" that Claimant's exposure to coal mine dust in the mines also contributed to his pulmonary impairment. Dr. Sherman declared that there is no way to determine exactly how much the exposure to coal dust during Claimant's underground coal mine employment contributed to the impairment. Dr. Sherman agreed with Dr. Farrow that there is no way to partition the effects of "each exposure exactly"; however, he opined that it is impossible to exclude the dust exposure from mining as causing additional damage. Dr. Sherman opined that it was "likely" that the contribution from the coal mine dust exposure was small, but that it was "not possible" to say whether the contribution was significant or not. Dr. Sherman agreed with Dr. Farrow that Claimant could not perform his previous coal mine job due to his respiratory impairment. (D-10)

Conclusions of Law and Discussion

Length of Coal Mine Employment

The term "coal miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. §725.101(a)(19) The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment. *Id.* To prove coal mine employment, the Fourth Circuit requires a worker to satisfy two requirements, that he performed a function integral to the coal production process (the function prong), and that the work that was performed occurred in or around a coal mine or coal preparation facility (the situs prong). *See Collins v. Director, OWCP*, 795 F.2d 368 (4th Cir. 1986).

The function prong requires that the individual's work contribute to the extraction and preparation of coal. This requirement is satisfied if the individual's activities are found to be an integral or necessary part of the overall coal extraction process. *Canonico v. Director, OWCP*, 7 T.L.R. 1-547 (1984); *Bower v. Amigo Smokeless Coal Co.*, 2 B.L.R. 1-729 (1979). Transportation workers are "miners" under the regulations if their work is "integral to the extraction or preparation of coal." §725.202(b). Hauling coal from the mine to the tipple or another preparation facility constitutes coal mine employment. *Norfolk & Western Railway Co. v. Director, OWCP*, 5 F.3d 777 (4th Cir. 1993)(upholding *Roberson* to state that delivery of empty coal cars is part of coal preparation); *Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 14 B.L.R. 2-106 (4th Cir. 1990). However, hauling processed coal to consumers does not constitute coal mine employment. *Id.*

The situs prong requires that the individual work in or around a coal mine. The term "coal mine" means

> an area of land and all structures, facilities, machinery, tools, equipment,…and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

§725.101(a)(12). There is no requirement of contiguity, but the facility or area must be located in the vicinity of the mine which it serves and must be directly involved in one or more of the covered occupations. *See Seibert v. Consolidation Coal Co.*, 7 B.L.R. 1-42 (1984)(An individual's work repairing mining equipment in a central shop located "about one mile" from the nearest mine fails the situs test); *Duffy v. Director, OWCP*, 6 B.L.R. 1-655(1983)(An individual's work in a foundry not physically located next to the mine or on mine property adjacent to a coal facility fails the situs test).

Where the Social Security earnings record is found to be incomplete, it is reasonable to credit the claimant's uncontradicted testimony in establishing length of coal mine employment. *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984). A finding concerning the miner's length of coal mine employment may be based exclusively on the claimant's own testimony when it is uncontradicted and credible. *Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984).

Claimant's work for Carter Coal Co. in Coretta, West Virginia for seven to nine months in a coal mine laying track for coal carts qualifies as coal mine work because it is integral to the extraction of coal mining and was performed in a coal mine. Claimant's work for Clinchfield Railroad from 1947 to 1949 as a fireman on a steam engine that hauled coal from a coal mine in Elkhorn, Kentucky to steam plants and various independent coal yards in Spartanburg, South Carolina does not qualify as coal mine employment because the transportation of coal from a mine to consumers, e.g. steam plants and coal yards, is not integral to the processing of coal and does not satisfy the function prong. Claimant declared that he worked for Union Switch and Signal Co. from 1949 to 1950 in non-coal related work.

Claimant's work for Clinchfield Railroad from 1950 to 1974 as carman and repairman "in the shops," repairing coal hauling cars, driving and bucking "ribbits," using welding machines and burning torches, and working in the train yard inspecting and repairing coal cars, coupling air hoses, and performing brake tests was integral to the processing of coal and qualifies under the function prong; however, it is not clear from Claimant's statement how close the repair shops were to the mines, or how much time he spent repairing cars at the mines, so that the evidence does not establish the situs prong because Claimant did not prove that he was on equipment or land that was integral to the extraction process. Therefore, Claimant's work from 1950 to 1974 does not qualify as coal mine employment. Claimant also declared that he worked for Clinchfield Railroad in Dant, Virginia from 1974 to 1984 and, in addition to the previous duties as a carman and repairman, he would go to the coal mines to "pick up" "wrecked" coal hoppers and "rerail" cars that had been "wrecked." Dr. Farrow also reported that Claimant

worked "for the last 10 years of his life" at Dant, Virginia, where the coal trains were loaded and weighed, as a coal car weigher and operator, which was "particularly a dusty job." Claimant's last ten years of employment with Clinchfield coal was integral to the transportation and repair of coal mine cars and satisfies the function prong; he proved that he worked at the mines weighing, operating, and repairing coal mine cars, which satisfies the situs prong. Claimant has proved that his last ten years of employment qualifies as coal mine employment. Claimant's testimony is credible and consistent. The Director has not submitted evidence that controverts these findings. The Social Security records are incomplete, but do not contradict Claimant's testimony. Therefore, Claimant has proved ten years and seven to nine months of coal mine employment.

Claim for Benefits

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. For the purposes of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis. See §718.201. A disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201. In order to obtain federal black lung benefits, a claimant miner must prove by a preponderance of the evidence that: "(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause of his total respiratory disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529, 21 B.L.R. 2-323 (4th Cir. 1998); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 B.L.R. 2-304 (4th Cir. 1995); 20 CFR §§718.201-.204 (1999); *Gee v. W.G. Moore & Sons,* 9 B.L.R. 1-4 (1986). Failure to establish any of these elements precludes recovery under the Act.

Existence of Pneumoconiosis

Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§718.304, 718.305, and 718.306; or (4) the finding by a physician of pneumoconiosis as defined in §718.201 which is based upon objective evidence and a reasoned medical opinion. Since the record contains no evidence of a biopsy or autopsy, the existence of pneumoconiosis cannot be established under §718.202(a)(2). Since there is no evidence that Claimant suffers from complicated pneumoconiosis, the presumption set forth in §718.304 is inapplicable. Since the claim was filed after January 1, 1982, and since this is not a survivor's claim, the presumptions set forth in §§718.305 and 718.306 are inapplicable as well.

The existence of pneumoconiosis requires consideration of "all relevant evidence" under §718.202(a), as specified in the Act. Thus, if a record contains relevant x-ray interpretations, biopsy reports, and physicians' opinions, the Act would prohibit a determination based on x-ray

alone, or without evaluation of physicians' opinions that the miner suffered from "legal," as opposed to traditionally clinical, pneumoconiosis. *See Island Creek Coal Co. v. Compton,* 211 F.3d 203, 22 B.L.R. 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 B.L.R. 2-104 (3d Cir. 1997).

The record contains four interpretations of two chest x-rays. All four readings were negative for pneumoconiosis. Claimant has not proved the existence of pneumoconiosis under §718.202(a)(1).

Dr. Farrow opined that Claimant had pneumoconiosis related to coal dust exposure from his railroad work, which included ten years of work which qualifies as coal mine employment. He was equivocal as to the effects of Claimant's brief underground coal mine dust exposure. Dr. Sherman did not opine that Claimant had pneumoconiosis, *per se*, but stated that the cause of Claimant's lung disease was "primarily" coal dust exposure from several sources, including an underground coal mine and coal mine related railroad work. Thus, the lung disease qualifies as legal pneumoconiosis. Both physicians are board-certified in internal medicine and the subspecialty of pulmonary disease. While there is no radiographic evidence of pneumoconiosis, both physicians opined that Claimant has what qualifies as "legal" pneumoconiosis, and their reasoned opinions are based on the medical evidence of record. Therefore, since there is no medical opinion to the contrary, the preponderance of the evidence establishes that Claimant has pneumoconiosis under §718.202(a)(4).

Causation

In addition to establishing the existence of pneumoconiosis, a claimant must also establish that his pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to §718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten years as a coal miner. In the instant case, Claimant established at least ten years of coal mine employment.

There is a large disparity in Claimant's coal mine employment history as found by Dr. Farrow and Dr. Sherman. Dr. Farrow relied on a thirty-three year coal mine employment history, while Dr. Sherman relied on a six to nine month coal mine history, but recognized the adverse effects of coal dust exposure during Claimant's varied railroad work. Dr. Farrow opined that "most of the exposure" to coal dust while working for Clinchfield Railroad caused Claimant's pneumoconiosis. Dr. Sherman opined that the cause of Claimant's pneumoconiosis was "primarily" coal dust exposure from working for Clinchfield Railroad. Both physicians opined that Claimant's brief history in the coal mines as an underground coal miner most likely added to Claimant's pulmonary impairment, though they could not determine if the cause was substantial. This tribunal has determined that ten years of Claimant's employment with Clinchfield Railroad was coal mine employment. It can be inferred that Dr. Sherman attributed in part Claimant's exposure to coal dust during his ten year's of coal mine related railroad employment as a substantial cause of Claimant's pulmonary impairment. While Dr. Farrow technically overstated Claimant's coal mine history, he also included by reference Claimant's exposure to coal dust during his last ten years of employment with Clinchfield Railroad as a

cause of the pneumoconiosis. Therefore, Claimant's exposure to coal dust during his employment with Clinchfield Railroad, when he qualified as a coal miner, contributed to the Claimant's impairment. The Director did not rebut the presumption of causation. Thus, Claimant is entitled to the rebuttable presumption that his pneumoconiosis arose from his coal mine employment under the provisions of §718.203(b).

Total Disability Due to a Pulmonary or Respiratory Impairment

To establish total disability, Claimant must prove that he is unable to engage in either his usual coal mine work or comparable and gainful work as defined in §718.204. Section 718.204(b)(2) provides the criteria for determining whether a miner is totally disabled. These criteria are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas studies qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinion of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled by pneumoconiosis. *Shedlock v. Bethlehem Mines. Corp.*, 9 B.L.R. 1-95 (1986).

The record contains evidence of two pulmonary function studies. While the January 18, 2002, test is nonconforming, both pre- and post-bronchodilator results, along with the results from the conforming February 23, 2001, test, were qualifying. Dr. Michos opined that the February 23, 2001, results were valid and that the results from the January 18, 2002, test were invalid, for lack of tracings. However, while the 2002 results are nonconforming, there are no pulmonary function studies that controvert the qualifying results. Therefore Claimant has proved by a preponderance of the pulmonary function study evidence that Claimant is totally disabled under §718.204(b)(2)(i).

Two arterial blood gas studies were performed on Claimant, the first on February 23, 2001, and the second on January 18, 2002. Both studies were conforming. Neither study produced qualifying results. Therefore, Claimant has not established that he was totally disabled by a preponderance of the arterial blood gas evidence under §718.204(b)(2)(ii). Since there is no evidence of cor pulmonale with right-sided congestive heart failure, Claimant has not proved total disability pursuant to §718.204(b)(2)(iii).

Dr. Sherman opined that Claimant was totally disabled due to a respiratory disease. While Dr. Farrow never directly stated that Claimant was totally disabled, he did opine that Claimant had a severe obstructive ventilatory defect, and the pulmonary function studies support a finding of total pulmonary disability. In addition, Dr. Farrow opined that Claimant was unable to perform his previous coal mine employment, and it is reasonable to infer that the disability was caused by the severe obstructive ventilatory defect observed by Dr. Farrow. The opinions of Drs. Sherman and Farrow are well documented, reasoned, and their findings are supported by the medical evidence. The Director submitted no evidence that controverts a finding of total disability due to a pulmonary or respiratory impairment. Therefore, Claimant has proved by a preponderance of the evidence that he was totally disabled by a pulmonary or respiratory disease.

Total Disability Due to Pneumoconiosis

To establish entitlement, a claimant must prove by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.* In reasoned and documented reports, Dr. Farrow opined that Claimant had a severe pulmonary defect caused by tobacco smoke and coal dust. He also opined that the defect caused Claimant's severe impairment and Claimant would not be able to perform his previous coal mine employment. It is apparent from these opinions that Dr. Farrow concluded that Claimant was totally disabled, at least in substantial part, due to legal pneumoconiosis. Dr. Sherman did not opine on the precise contribution of the coal dust exposure to Claimant's disability, and he opined that it was impossible to determine the significance of the contribution of Claimant's exposure during his actual but limited coal mine work. However, while Dr. Sherman does not specifically say that Claimant's disability was caused by pneumoconiosis, it is inferred from his opinion that Claimant could not perform his previous coal mine job due to his respiratory impairment caused "primarily" by coal dust exposure during Claimant's employment with Clinchfield Railroad. In addition, Dr. Sherman's finding is not contradictory to Dr. Farrow's finding; indeed it supports Dr. Farrow's finding that Claimant's pneumoconiosis caused his total disability. Therefore, Claimant has proved by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. The Director did not submit evidence that would controvert a finding of total disability due to pneumoconiosis.

Date of Onset

Section 725.503(b) of the act provides that benefits are payable to a miner who is entitled to payment of benefits beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claim was filed, and "[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." §§725.309(d)(5), 725.503(b) Dr. Farrow first opined that Claimant was disabled due to pneumoconiosis on February 23, 2001. There is no evidence of earlier onset. Therefore, February 23, 2001, is deemed to be the onset date which establishes entitlement to payment of benefits as of February 1, 2001.

ORDER

The claim of Glen Howard for black lung benefits under the Act is hereby granted. The Black Lung Disability Trust Fund shall pay to Claimant the benefits to which he is entitled commencing as of February 1, 2001. No attorney's fee is payable since Claimant was not represented by counsel.

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EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the **Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of this notice must also be served on Donald S. Shire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.